

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

LOUGHMILLER RECLAMATION L.L.C.

Employer  
and

Case 19-RC-14138

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 400, AFL-CIO

Petitioner

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>1</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6)(7) of the Act, for the following reasons:

By its petition as amended at hearing, Petitioner seeks a unit of all employees employed by the Employer within the State of Montana and Yellowstone National Park, excluding all guards and supervisors as defined by the Act. There are about 13 employees in the proposed unit. The Employer contends that no election should be conducted because the cessation of the Employer's project in the designated geographic area is imminent. In the event an election were nevertheless directed, the Employer argues that the unit sought is not appropriate,<sup>2</sup> and, further, that Ladonna Herndon<sup>3</sup> should be excluded from any unit found appropriate.

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<sup>1</sup> The parties filed briefs, which have been considered.

<sup>2</sup> The unit sought includes both heavy equipment operators and laborers. The Employer contends that the two groups lack a community of interest.

The Employer is engaged in gravel crushing. The Employer's headquarters is located in Twin Falls, Idaho, and it owns and operates two gravel crushing pits in Idaho. The Employer is currently a subcontractor for Van Dyke Construction on a federal highway project in the State of Montana. The Employer is operating two rock crushers on the project. The Employer's portion of the project is scheduled to be completed, or substantially completed, by September 24, 2001. Failure to comply will result in \$1,000 per day in liquidated damages. Van Dyke has a deadline of October 9.

At the time of the hearing, on August 14, 2001, the Employer had been in operation on the project for 19 workdays<sup>4</sup> and had crushed about 50,000 metric tons of rock. The full project will require about 175,000 tons. Thus, at the time of the hearing, about 29 percent of the total had been crushed, an average of about 2632 metric tons per workday.<sup>5</sup> Thirty-five workdays remained until the September 24 deadline. Assuming the crushers continue to operate at the same average daily rate, an additional 92,120 metric tons would be crushed by September 24, leaving another 32,880, or about 13 more days' work, to go. This is without considering any other variables, such as the four to five days required to move a crusher to a new location. The Employer had plans to move one of its crushers to a new location on the day following the hearing, and expected to make three more such moves before the job was completed. In addition, witness testimony established that there is always the possibility of time-consuming breakdowns. A co-owner of the Employer testified that the Employer is determined to complete the project by the established deadline, and will add a second shift on the other crusher if necessary. Further, the project must be completed before inclement weather sets in.

In *M.B. Kahn Construction*, 210 NLRB 1050 (1974), a hearing was held in December 1973. The unit was expected to cease to exist by June 1974. The Board dismissed the petition in May 1974, stating that no useful purpose would be served by conducting an election. Similarly, in *Frazer-Brace Eng'g Co.*, 38 NLRB 1263 (1942) the Board found on February 16, 1942, that where the unit employees would all be laid off approximately a month and a half later, no purpose would be served by conducting an election. In *Davey McKee Corp.*, 308 NLRB 839 (1992), the Board denied review of the Regional Director's decision to dismiss the petition where there were only 29 days from the date the hearing closed to the date on which the relevant projects would end.

While there is some doubt that the Employer's work on the project will be completed by September 24, the record offers no evidence that the project will continue for any significant period of time thereafter. While it can never be said with absolute certainty that any future event is going to occur as anticipated, there is no basis in this record for concluding that the Employer's project in Montana is not going to be completed within about a month and half from the date of issuance of this decision.

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<sup>3</sup> Herndon is the wife of Craig Herndon, the sole supervisor on the job. The parties stipulated that Craig Herndon is a statutory supervisor, and, based upon the record as a whole, I accept the stipulation thereon. Ladonna Herndon is employed on the job as a loader operator and is also the Employer's Mine Safety Health Act compliance officer on the job.

<sup>4</sup> The project was originally scheduled to begin on June 11, but was delayed until July 24 by the need to obtain a Montana air quality permit for the crusher owned by the Employer. (The second crusher was leased locally.)

<sup>5</sup> The Employer commenced operations with one crusher. On August 3, a second crusher began operating, and one of the crushers has been operating 24 hours a day at least since that time. At the time of the hearing, a "work day" consisted of three 12-hour shifts, two on one crusher and one on the other.

Petitioner contends that even if the end of the Employer's current project is imminent, there remains a probability that the Employer will perform work on other projects in Montana, and that therefore the current employees have a reasonable expectation of future recall. There is no evidence to support Petitioner's contention in this regard.

The Employer's co-owner, Steve Millington, testified that all employees working in Montana except the Herndons will be laid off when the current project ends, and the Employer has not bid on or contracted for any further projects in Montana. He testified that the Employer bid on the current project at the invitation of Van Dyke, with which the Employer had had prior dealings in Idaho, and that Van Dyke "kind of made it clear that it's going to be a cold day in somewhere before he asks us to bid with him again. The probabilities of us doing work in Montana under any circumstances are so flipping remote that I just have absolutely no concern about it ever happening, period." Millington's testimony establishes that the Employer normally works only at the two pits it owns in Idaho, where it employs a compliment of permanent employees.

Petitioner offered evidence that Millington purchased a copy of the Standard Specifications for Road and Bridge Construction from the Montana Department of Transportation on June 25. Millington testified that he bought it for reference purposes, and there is no evidence to support Petitioner's contention that Millington bought the book in preparation for bidding on other work in Montana. Further there is no evidence that the Employer has in fact bid on any future work in Montana.

An employee witness testified that he was not told at the time he was hired that the job would end on September 24 and that he would not be recalled thereafter. He testified that he has an expectation of recall based on his prior work experience that construction employers recall employees who perform their work well, and that he is willing to travel. However, such testimony does not establish any reasonable expectation of recall, inasmuch as there is no evidence that the Employer will have any work available in the future.

In sum, the Employer's current project in Montana will cease in the near future, and there is no evidence that the Employer will be engaged in any work in the foreseeable future in Montana. In these circumstances, in accordance with the Board's findings in the above-cited cases, in particular *Frazer-Brace*, I conclude that no useful purpose would be served by conducting an election herein, and I shall dismiss the petition.

Having so concluded, it is unnecessary for me to address the unit issues raised by the Employer.

### **ORDER**

**IT IS HEREBY ORDERED** that the petition filed herein be, and it hereby is, dismissed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by September 13, 2001.

DATED at Seattle, Washington this 30<sup>th</sup> day of August 2001.

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Catherine M. Roth, Acting Regional Director  
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